Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-27

EDWARD LECCI, Individually and as representative of Nassau County Patrolmen's Benevolent Association,

Petitioners,

v.

FRANCIS B. LOONEY, as Commissioner of the Police Department, Nassau County and the NASSAU COUNTY POLICE DEPARTMENT,

Respondents.

Petition for a Writ of Certiorari to the Court of Appeals for the State of New York

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Petitioners pray that a writ of certiorari issue to review the judgment of the Court of Appeals for the State of New York entered on April 7, 1971

Citations to Opinions Below

The opinion of Special Term Supreme Court, Nassau County, State of New York dismissing Petitioner's complaint is printed in Appendix C hereto. The opinion of the Appellate Division of the Supreme Court unanimously affirming the findings of Special Term is printed in Appendix B and is reported at 318 N.Y.S. 2d 689 (1971).

The opinion of the Court of Appeals of the State of New York denying Petitioner's motion for leave to appeal is printed in Appendix A hereto and as yet has not been reported in the official reports.

Jurisdiction

The judgment of the Court of Appeals was entered on April 7, 1971. The Court of Appeals by its action denied Petitioner's motion for leave to appeal thereby exhausting Petitioner's state remedies.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257 (3).

The Questions Presented

1. Whether Commissioner's Order Number 45, Subdivision 5 of the Nassau County Police Department is unconstitutional and thus invalid.

2. Whether a justiciable controversy exists between Petitioner and Respondent.

Constitutional Provisions, Statutes Rules, etc., Involved

The constitutional provisions involved are the self-incrimination clause of the fifth amendment to the United States Constitution and its applicability to the states through the fourteenth amendment. The Civil Practice Law and Rules, section 3001 of the State of New York. The Rules and Regulations of the Police Department of the County of Nassau, Article VI, Rule 9, Subdivision I. Commissioner's Order Number 45, Subdivision 5 of the Nassau County Police Department, State of New York. These provisions are printed in Appendix D.

Statement

Petitioner was appointed to the Police Department of the County of Nassau on the 16th day of May 1949, and has remained up to the date of this action, a member in good standing of said department. Additionally, at the commencement of this action, Petitioner was the duly elected President of the Nassau County Patrolmen's Benevolent Association which is the certified bargaining agent for the patrolmen, sergeants, lieutenants and Captains of the Nassau County Police Department.

This action was brought by the Petitioner in the Supreme Court, County of Nassau, State of New York to seek to have the Court declare as unconstitutional and invalid Commissioner's Order Number 45, Subdivision 5 of the Nassau County Police Department, State of New York that was promulgated allegedly pursuant to statutory authority on September 26, 1969 by Respondent, Francis B. Looney.

The Petitioner commenced this action in the Supreme Court, County of Nassau, State of New York on the 25th day of March 1970 by the service of a Complaint. The motion of the Respondent to dismiss was served on April 27, 1970. On the basis of the pleadings submitted and an oral argument, Special Term, on May 27, 1970, dismissed the Complaint. On January 18, 1971 the Appellate Division of the Supreme Court unanimously affirmed the findings of Special Term. On April 7, 1971 the Court of Appeals of the State of New York denied Petitioner's motion for leave to appeal thereto.

Reasons for Granting the Writ

Point I

This Petition raises substantial and important questions concerning the rights of an individual, and in particular, those of a police officer, that are guaranteed under the Bill of Rights of the Constitution of the United States. In particular, this petition asks the Court to examine the extent to which a police officer can be subjected to mental coercion before it is determined that he is being denied his constitutional right to freely exercise his fifth amendment guarantee against self-incrimination.

This petition pertains to a police department order that requires a police officer, who is suspected of official misconduct, to account to his superiors either verbally or in writing for his official actions for purposes of internal disciplinary action even through such an accounting could be culpatory in nature.

This requirement to account is qualified in two respects. First, the content of any accounting is not to be used in any criminal proceeding unless given under a waiver, and second, any failure to account will, in effect, result in the dismissal of the officer from the department under Article VI, Rule 9, Subdivision I, of the Rules and Regulations of the Police Department of the County of Nassau, State of New York.

This Court has previously commented upon the question presented in this petition; namely, the extent to which a police officer's freedom to invoke his constitutional guarantee against self-incrimination can be infringed. In Garrity v. New Jersey, 385 U. S. 493 (1966), this court recognized that a state could not use the threat of discharge against a police officer to secure incriminating evidence against said officer. To impose on a police officer the choice between self-incrimination or job forfeiture was held to be nothing more

than a means by which a police officer was subjected to mental coercion in an attempt to erode his free exercise of his constitutional right against self-incrimination.

Petitioner respectfully submits that in operation, Commissioner Order Number 45, Subdivision 5 of the Nassau County Police Department State of New York, is nothing more than an attempt to perpetuate the practice condemned in Garrity. Under Commissioner's Order Number 45, a police officer is forced to elect between job forfeiture and self-incrimination, since the election on the part of the police officer to exercise his right against self-incrimination and thus stand mute results in his dismissal from the police force for failure to obey a departmental order under Article VI, Rule 9, Subdivision I of the Rules and Regulations of the Police Department of the County of Nassau, State of New York.

In Gardner v. Broderick, 392, U. S. 273 (1968) this Court most recently spoke out in this area. In Gardner, a New York City Patrolman was advised that a grand jury proposed to examine him concerning the performance of his official duties. The patrolman was advised of his right against self-incrimination, but was asked to sign a waiver of immunity against prosecution with respect to said examination after having been told that he would be fired if he refused to sign. Upon refusing to sign, the patrolman was discharged solely for said refusal pursuant to Section 1123 of the New York City Charter that provides:

> "If any councilman or other officer or employee of the city shall, after lawful notice or process, wilfully refuse or fail to appear before any court or judge, any legislative committee, or any officer, board or body authorized to conduct any hearing or inquiry, or having appeared shall refuse to testify or to answer any question regarding the property, government or affairs of the city or of any county included within its territorial limits, or regarding the nomi-

> nation, election, appointment or official conduct of any officer or employee of the city or of any such county, on the ground that his answer would tend to incriminate him, or shall refuse to waive immunity from prosecution on account of any such matter in relation to which he may be asked to testify upon any such hearing or inquiry, his term or tenure of office or employment shall terminate and such office or employment shall be vacant, and he shall not be eligible to election or appointment to any office or employment under the city or any agency."

Additionally section 6 of Article I of the New York Constitution provides:

> "No person shall be . . . compelled in any criminal case to be a witness against himself, providing, that any public officer who, upon being called before a grand jury to testify concerning the conduct of his present office . . . or the performance of his official duties . . . refuses to sign a waiver of immunity against subsequent criminal prosecution, or to answer any relevant question concerning such matters before such grand jury, shall by virtue of such refusal, be disqualified from holding any other public office or public employment for a period of five years . . . and shall be removed from his present office by the appropriate authority or shall forfeit his present office at the suit of the attorney general."

Here, as in Garrity, the Court condemned the dilemma that the patrolman was placed in as one that had a coercive effect upon his freedom to exercise his constitutional right against self-incrimination.

It is true that under the circumstances presented in this petition, a police officer is not first required to sign a waiver of immunity, however, he is nevertheless faced with the coercive pressure to forego his freedom to exercise his con-

stitutional right against self-incrimination to prevent his dismissal from the police force which practice was condemned in Garrity. Although Gardner possibly clarifies the question raised in this petition, its holding revolved around a provision of the New York City Chapter and a provision of the New York State Constitution which are not applicable to the case at hand. It is therefore respectfully submitted that due to the importance of the constitutional guarantee brought in issue by this petition and due to the fact that the prior cases in this area were decided within factual frameworks distinct from that of the present case, that this Petition for a writ of Certiorari be granted to clarify the issue.

Point II

A justiciable controversy does exist between the Petitioner and Respondent by virtue of the fact that Petitioner is a member of the Nassau County Police Department. It is recognized by courts that to maintain a cause of action, a justiciable controversy must exist between the parties as evidenced by an "aggrieved party".

An "aggrieved party" has been defined by courts to mean a party prejudiced or denied some personal or property right. (Application of Burns, 108 N.Y.S. 2d 62 (1951). Commissioner's Order Number 45, Subdivision 5 of the Nassau County Police Department, when viewed in conjunction with Article VI, Rule 9, Subdivision I of the Rules and Regulations of the Police Department of the County of Nassau, unquestionably prejudices Petitioner by subjecting him to coercive pressures that effectively deny petitioner his constitutional right against self-incrimination, said pressures being the loss of property rights pursuant to Article VI, Rule 9, Subdivision I of the Rules and Regulations of the Police Department of the County of Nassau should he attempt to uphold his constitutionally guaranteed right against self-incrimination.

CONCLUSION

For the reasons stated above, Petitioners respectfully submit that this Petition for a Writ of Certiorari be granted.

Respectfully submitted,

RICHARD HARTMAN, ESQ.
Attorney for Petitioners
300 Old Country Road
Mineola, New York 11501
(516) PI 2-9000

Appendix A

Order Denying Leave to Appeal to Court of Appeals.

STATE OF NEW YORK, IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the seventh day of April A.D. 1971.

Present, Hon. Stanley H. Fuld, *Chief Judge, presiding.*

In the Matter of the Application of

EDWARD LECCI, Individually and as representative of the Nassau County Patrolman's Benevolent Association,

Appellant,

For a Judgment &c.

vs.

FRANCIS B. LOONEY, as Commissioner of the Police Department, Nassau County, & ano.,

Respondents.

A motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellant herein and papers having been duly submitted thereon and due deliberation thereupon had:

Ordered, that the said motion be and the same hereby is denied with ten dollars costs and necessary printing disbursements.

A copy

Gearm Kimball
Deputy Clerk

Appendix B

Order of Affirmance

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on January 18, 1971.

HON. SAMUEL SABIN, *Presiding Justice*
HON. J. IRWIN SHAPIRO
HON. MARCUS G. CHRIST
HON. A. DAVID BENJAMIN
Associate Justices

In the Matter of
EDWARD LECCI, et al.,

Petitioner

v.

FRANCIS B. LOONEY, as Commissioner of the Police Department, Nassau County, et al.,

Respondent

In the above entitled cause, the above named Edward Lecci, etc., plaintiff having appealed to this court from a judgment of the Supreme Court, Nassau County, dated July 20, 1970; and the said appeal having been submitted by Richard Hartman, Esq., of counsel for the Petitioner, and by Bonnie Singer, Esq., of counsel for the Respondent, and due deliberation having been had thereon; and upon this court's decision slip heretofore filed and made a part hereof, it is:

ORDERED that the judgment appealed from is hereby unanimously affirmed, with $10.00 costs and disbursements.

Enter:

HERMAN M. POGUL
Clerk of the Appellate Division

Appendix C

Memorandum Decision of Mr. Justice Velsor

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NASSAU

Index No. 4273/70
Motion Cal. No. 21 (5/12/70)

Special Term I

By Velsor, *Justice*

Dated: May 27, 1970

RICHARD HARTMAN, ESQ.,
Attorney for Plaintiff
300 Old Country Road
Mineola, N.Y. 11501

MORRIS H. SCHNEIDER, ESQ.,
Attorney for Defendants
County Executive Bldg.,
Mineola, N.Y.

Motion pursuant to CPLR 3211 (a) (7) to dismiss the complaint on the ground that there is no justiciable controversy between the parties is GRANTED.

In the complaint praying for a declaratory judgment, the plaintiff, a member of the Police Department of the County of Nassau alleges that an order issued on September 26, 1969 by the defendant Commissioner of Police of the County of Nassau, known as order Number 45, is unconstiutional and invalid because it denies a member of the police force the right to remain silent in a internal disciplinary proceeding.

The plaintiff does not allege that he is the subject of an investigation by the department or of a departmental

disciplinary proceeding. To maintain a proceeding pursuant to Article 78 of the CPLR or an action for a declaratory judgment the petitioner or plaintiff must be aggrieved (See *Haber* v. *Board of Estimate of City of New York*, 33 AD 2d 571; *Matter of Donohue* v. *Cornelius* 17 N.Y. 2d 390). Since the plaintiff is not involved in a disciplinary proceeding and has not been asked to "account for his actions for purposes of internal disciplinary action" (Order No. 45, subd. V) he is not aggrieved by the rule and there is no justiciable controversy existing between him and the respondent.

Therefore the Court declines to entertain the action (CPLR 3001; see *American News Company, Inc.*, v. *Avon Publishing Co., Inc.*, 283 App. Div. 1041). If, and when, a particular officer is disciplined for failure to account for his actions the propriety of Order 45 may be questioned in an Article 78 proceeding.

It may be observed, in passing however, that Order No. 45, subd. V pertains to a procedure approved in *Gardner* v. *Broderick* 392 US 273, 278 where the Supreme Court of the United States held that a police officer who was not required to waive his immunity with respect to criminal prosecution could be dismissed if he failed to answer questions in an administrative proceeding relating to the performance of his official duties (*cf. matter of Krolick* v. *Lowery*, 32 A.E. 2d 317, 324, 325).

Submit judgment on notice.

J.S.C.

Judgment

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NASSAU

(Same Title)

The plaintiff herein, having moved this Court by a complaint dated March 25, 1970, for a Judgment pursuant to Section 3001 of the Civil Practice Laws and Rules directing that defendant be restrained from promulgating Commissioner's Order Number 45, Subdivision 5 of the Nassau County Police Department, and from promulgating and enforcing other similar such Rules and Orders, and that said Order be declared unconstitutional and invalid,

Now, upon the complaint of Edward Lecci, by his attorney, Richard Hartman, and the proof of due service thereof filed herein, and upon the notice of motion to dismiss by the defendants, dated April 27, 1970, pursuant to subdivision (a) (7) of Rule 3211 of the Civil Practice Law and Rules, on the ground that there is no justiciable controversy between the parties, and the affirmation of Louis Schultz, Senior Deputy County Attorney, dated April 27, 1970, and the affidavit in opposition to said motion, being duly verified by Richard Hartman and dated April 29, 1970, and said motion having been submitted before me on May 12, 1970, and having heard Louis Schultz in support of said motion, and Richard Hartman in opposition thereto, and due deliberation having been had thereon, and upon reading and filing the decision of this Court dated May 27, 1970, it is

ORDERED, ADJUDGED AND DECREED that the complaint be and the same hereby is dismissed on the merits.

Enter,

THEODORE VELSOR
J.S.C.

Granted: July 20, 1970
HAROLD W. McCONNELL
Clerk

Appendix D

AMENDMENT V OF THE UNITED STATES CONSTITUTION

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation.

AMENDMENT XIV OF THE UNITED STATES CONSTITUTION

SECTION 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

THE CIVIL PRACTICE LAW AND RULES OF THE STATE OF NEW YORK

§ 3001. Declaratory judgment

The Supreme Court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed. If the court declines to render such a judgment it shall state its grounds.

HEADQUARTERS

POLICE DEPARTMENT, COUNTY OF NASSAU

COMMISSIONER'S) MINEOLA, NEW YORK
ORDER NUMBER 45) SEPTEMBER 26, 1969

INTERNAL INVESTIGATION PROCEDURES

The Nassau County Police Department, being aware of its responsibilities both to the public and its members, has always maintained that complaints against police officers should be directed to the Police Department. This is the position adopted by law enforcement throughout the United States. The basis for the position is simply that police departments must be self-administered and police officers should be answerable to their superiors for their conduct, if we are to maintain the integrity and independence of our police agencies. In order to sustain this position it is imperative that we respond to all complaints concerning improper police conduct and thoroughly investigate same in a fair and impartial manner.

Our Department has diligently and conscientiously directed itself to meeting its obligations with respect to the proper investigation of all complaints. Based on the premise as enunciated by both the Supreme Court of the United States and the New York State Court of Appeals "that persons in public office have no constitutional right to remain in office when they refuse to discuss with frankness and candor whether they have faithfully performed their duties, "this Department requires its members to account for their actions through their Superior Officers.

For the information and guidance of all members, the Internal Investigative Procedures of the Department are herein set forth:

1. The Internal Investigation Unit shall be responsible for the prompt and thorough investigation of all complaints against members of the Department.

(Commissioner's Order Number 45)

II. Complaints by civilians against members of the department may be made at any time at any precinct or any command or office of this department. Such complaints may be made in writing, in person or by telephone. Every effort shall be made to facilitate the receipt and processing of civilian complaints. A complaint shall be processed and investigated whether or not it is designated a "complaint."

III. When a complaint is received, a member of the Internal Investigation Unit shall be immediately notified and a prompt investigation shall be instituted. Within ten (10) days after receipt of the complaint, a report shall be submitted to the Office of Commissioner of Police by the Internal Investigation Unit. The report shall include the following:

(a) Time the complaint was originally received.

(b) Time the Internal Investigation Unit was notified.

(c) Details of the complaint, and the identity and statements of witnesses and others interviewed.

(d) Steps taken in connection with the investigation and the nature and result of inspections, examinations, surveys, etc.

(e) Findings of fact.

(f) Recommendations.

IV. While the Department recognizes the right of any person, including police officers, to exercise their Fifth and Sixth Amendment rights to remain silent and to be represented by counsel in matters of a criminal nature under circumstances of "custodial interrogation," the internal investigations of complaints concerning the official conduct of police officers are seldom criminal in nature and are not for the purpose of undertaking criminal proceedings but

are fact-finding inquiries for the purpose of clearing innocent officers of wrongful charges and holding those guilty of improper conduct or performance administratively accountable.

V. If an investigation involves misconduct by a police officer of a criminal nature, it is the established practice of the Department to advise the member of that fact and his right to remain silent or to be represented by counsel and to afford him the opportunity to exercise such rights when applicable and as provided by existing law. However, in such cases, the Department does insist on exercising its legal right to have the member account for his actions for purposes of internal disciplinary action. Such an accounting, if incriminating in nature, cannot be used in a criminal proceeding unless given under a waiver.

VI. Investigations shall be thorough and complete and conducted in a fair, impartial and reasonable manner. Members who are the subject of an investigation, when directed to submit an official report, shall be permitted to include any and all information that said member feels is pertinent or material, but the member is responsible for rendering a complete and responsive report.

If it is impossible to complete the investigation within ten (10) days, the Internal Investigation Unit shall report within the original ten (10) days the reason for the delay and shall request additional time.

The following officers are hereby assigned to the Internal Investigation Unit:

Unit Supervisor — Chief Inspector Herman J. Maickel

Assistant Chief Inspector Louis J. Frank
Deputy to Chief of District

(Commissioner's Order Number 45)

Deputy Chief Inspector John J. Cummings
Commanding Officer, Precinct Squads, Detective Division

Deputy Chief Inspector William C. McCullough
Commanding Officer, Traffic Safety Division

s/ Francis B. Looney
Francis B. Looney
Commissioner of Police

RULES AND REGULATIONS OF THE POLICE DEPARTMENT OF THE COUNTY OF NASSAU, STATE OF NEW YORK

ARTICLE VI

Rule 9. Members of the Force or Department shall:

1. Promptly obey all lawful orders, instructions, directions, and requests of Superior Officers.

   a. Orders of the members of the Force assigned to the Office of Commissioner of Police, Office of Chief Inspector, Office of Chief of Headquarters, Office of Chief of Detectives, or the Office of Chief of District, when so directed, shall be deemed to be the orders of such members' superior and shall be promptly obeyed as such.